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No. 95-1994

# In the Supreme Court of the United States

OCTOBER TERM, 1996

JESUS MACIAS-MUNOZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the district court's use of the preponderance of the evidence standard to determine the amount of drugs attributable to petitioner for purposes of sentencing violates the Due Process Clause.

2. Whether the district court correctly enhanced petitioner's sentence for restraint of victim under Sentencing Guidelines § 3A1.3.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 74 F.3d 545.

### JURISDICTION

The judgment of the court of appeals was entered on January 23, 1996. A petition for rehearing was denied on March 13, 1996. Pet. App. 33a. The petition for a writ of certiorari was filed on June 11, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of one count of conspiring to import more than five kilograms of cocaine, in violation of 21

U.S.C. 952, 960 and 963; one count of conspiring to possess more than five kilograms of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841 and 846; two counts of laundering monetary instruments, in violation of 18 U.S.C. 1956; two counts of conspiring to commit a kidnapping, in violation of 18 U.S.C. 1201; and two counts of using a telephone to commit a crime of violence in furtherance of an unlawful activity, in violation of 18 U.S.C. 1952. The district court sentenced petitioner to a term of life imprisonment. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-32a, Pet. 5, Pet. C.A. R.E. Tab 5, at 1.

1. Petitioner was a member of a cocaine trafficking organization in El Paso, Texas. After conducting a lengthy investigation of the organization, government agents seized 45 kilograms of cocaine and $189,980 in drug proceeds. Between June 1988 and June 1992, the organization transported more than 8,000 kilograms of cocaine from El Paso to California and more than $7,000,000 in drug proceeds from California and Chicago to El Paso. Gov't C.A. Br. 4.

a. Rene Gandara and his brother, Jose Luis Gandara, recruited their cousin, Jaime Carrera to receive, store, and distribute cocaine for them in California. Carrera eventually became a cooperating witness and testified for the government at petitioner's trial. In June 1988, Carrera received and distributed 100 kilos of cocaine. He then flew to El Paso, where Jose Luis Gandara introduced him to petitioner, identifying him as a member of the drug trafficking organization to which the Gandaras belonged. Gov't C.A. Br. 4-5.

Between December 1988 and July 1989, Carrera received cocaine shipments of 99 kilos, 150 kilos, 750

kilos, 1,050 kilos, and 1,300 kilos. Between February 1990 and November 1990, Carrera received cocaine shipments of 1,000 kilos, 300 kilos, 150 kilos, 500 kilos, and 300 kilos. Petitioner helped arrange the 500-kilo shipment. During that same period, Carrera helped count drug proceeds of more than $500,000. In December 1990, petitioner gave Carrera a key to a warehouse where Carrera counted 1,000 kilos of cocaine. On petitioner's instructions, Carrera transported 115 kilos of cocaine to a co-conspirator. Gov't C.A. Br. 5-8.

In October 1990, petitioner arranged through an intermediary, Alex Navarro, to sell $4 million worth of cocaine to Juan Soto-Velasquez. Soto made two partial payments totalling $950,000, but did not pay the rest. Petitioner expected Navarro to arrange for the payment of the rest of what he was owed. In an effort to pay off part of the debt, Navarro introduced petitioner to two purported drug dealers who were in fact undercover FBI agents. Petitioner told the agents that he could transport large quantities of cocaine. Gov't C.A. Br. 9-10.

In January 1991, on petitioner's instructions, Carrera collected $480,000 in Los Angeles and delivered it to Rene Gandara in El Paso. Carrera helped Gandara count more than one million dollars. In March 1991, again at petitioner's direction, Carrera picked up 30 kilos of cocaine from a co-conspirator's residence. Carrera later sent $360,000 from the sale of that cocaine to Rene Gandara. Gov't C.A. Br. 11.

In September 1991, petitioner and Rene Gandara supplied Rene Fernandez-Corral with 45 kilos of cocaine. One of Corral's associates, Ruben Perez Archuleta, picked up the cocaine and brought it to his home in El Paso. Later, Corral warned Archuleta

about police surveillance, and Archuleta attempted to flee. When police officers tried to stop Archuleta, he abandoned his truck, jumped into the Rio Grande, and swam to Mexico. That evening, agents seized the 45 kilos of cocaine at Archuleta's home. Gov't C.A. Br. 11-12.

b. Petitioner's money laundering convictions arose out of his role in transporting drug proceeds from California and Chicago to El Paso. In May 1990, petitioner received $2 million from Navarro. In December 1990, petitioner instructed Carrera to collect $240,000 in California. In October 1991, petitioner sent two associates to Chicago to collect $189,000. Police officers stopped petitioner's associates on their way back from Chicago and seized $189,890. Gov't C.A. Br. 13-14.

c. Petitioner's kidnapping convictions arose out of the disappearance of 100 kilos of cocaine that the organization had entrusted to Beto Adame and Ricardo Olivares. In April or May 1991, Adame and Olivares were brought to Juarez for questioning concerning the missing cocaine. There, over a two-month period, petitioner beat and tortured Adame before finally releasing him. Olivares was released after two weeks, without having been beaten or tortured. In July 1991, Olivares was again abducted and taken to Juarez, where he was interrogated by petitioner about the missing cocaine. Petitioner helped to arrange the abduction. Gov't C.A. Br. 15-18.

2. The presentence report (PSR) recommended that petitioner be assigned a base offense level of 38 for his drug conspiracy offenses. See Gov't C.A. Br. 58; Guidelines § 2D1.1(c)(1) (base offense level 38 applies where offense involves 150 or more kilograms of cocaine). The district court adopted the PSR's

findings and overruled petitioner's objections to the PSR. See Pet. C.A. R.E., Tab 5, at 5. The court stated (see Gov't C.A. Br. 58):

> I think a preponderance of the credible evidence introduced in the case indicates that [petitioner] was involved in the conspiracy and a member thereof at least as early as January of 1990, and that thereafter he participated in, was involved in, or other conspirators handled in such a way that was reasonabl[y] foreseeable to him, not less than 1,500 kilograms of cocaine. I agree with the base offense level of 38.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-32a. The court rejected petitioner's challenge to the district court's calculation of the drug amount attributable to him. *Id.* at 20a-23a. The court of appeals held that the district court findings were adequate to satisfy the requirement in Fed. R. Crim. P. 32(c)(1) that a sentencing court must make findings of fact on matters that are controverted. Pet. App. 20a-21a. The court of appeals also concluded that the district court's findings were not clearly erroneous. *Id.* at 21a-22a. The court noted that the findings were supported by Carrera's testimony and that much of Carrera's testimony was corroborated by the testimony of other witnesses and by wiretap evidence. *Ibid.*

The court also rejected petitioner's contention that the district court should have applied a reasonable doubt standard, rather than a preponderance of the evidence standard, to determine the drug quantities attributable to him. Pet. App. 22a-23a. The court explained that use of the preponderance standard was "well-established" for sentencing purposes, and that

petitioner had not presented any authority for applying a different standard. *Id.* at 22a. The court also rejected petitioner's contention that a stricter standard was necessary because only 45 kilos of cocaine had been seized, noting that Guidelines § 2D1.1, Application Note 12, directs a sentencing court to "approximate the quantity of the controlled substance" where "the amount seized does not reflect the scale of the offense." Pet. App. 23a.

The court of appeals also rejected petitioner's challenge to the two-level enhancement under Guidelines § 3A1.3 for the physical restraint of Olivares and Adame during the course of the drug trafficking conspiracies. Pet. App. 26a-28a. The court concluded that, although Olivares and Adame were not victims of the conspiracies, the plain language of Section 3A1.3 applies when a person is restrained "in the course of the offense," regardless of whether that person is a victim of the offense itself. Pet. App. 26a-27a. The court also concluded that applying the restraint enhancement and sentencing petitioner for kidnapping did not constitute impermissible double-counting. *Id.* at 27a-28a. The court reasoned that double counting is impermissible only when the applicable guidelines prohibit it, and that Guidelines § 3A1.3 does not prohibit double-counting. Pet. App. 28a.[1]

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[1] The court of appeals concluded that the evidence was insufficient to support one of the money laundering counts against petitioner and reversed his conviction on that count. Pet. App. 15a-17a. The court also vacated petitioner's life sentence for using a telephone to commit a crime of violence because the maximum punishment for that offense is five years' imprisonment. *Id.* at 30a.

## ARGUMENT

1. Petitioner contends (Pet. 9-19) that the district court violated his due process rights when it used the preponderance of the evidence standard to determine the amount of drugs for which he was responsible. That argument is foreclosed by *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). In that case, a state statute provided that anyone convicted of certain felonies was subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge found by a preponderance of the evidence that the person possessed a firearm during the commission of the offense. The Court rejected the defendant's argument that due process required that possession of the firearm must be proved by at least clear and convincing evidence. The Court held that "the preponderance [of the evidence] standard satisfies due process" as applied to factual determinations that affect the length of a sentence. *Id.* at 91. The Court explained that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all," *ibid.*, and that there was nothing in the statutory scheme before it "that would warrant constitutionalizing burdens of proof at sentencing," *id.* at 92.

Consistent with *McMillan*, every court of appeals that has considered the issue has upheld the application of the preponderance of the evidence standard to factual findings underlying routine sentencing determinations.[2] The court of appeals in this case

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[2] See, *e.g.*, *United States* v. *Lam Kwong-Wah*, 966 F.2d 682, 685-686 (D.C. Cir.), cert. denied, 506 U.S. 901 (1992); *United States* v. *Blanco*, 888 F.2d 907, 909 (1st Cir. 1989); *United States* v. *Guerra*, 888 F.2d 247, 250-251 (2d Cir. 1989), cert.

correctly reached the same conclusion. See Pet. App. 22a-23a.

As petitioner notes, in *McMillan*, this Court stated that the case before it did not involve a situation in which a sentencing determination had become "a tail which wags the dog of the substantive offense." 477 U.S. at 88. In reliance on that dicta, several courts of appeals have left open the possibility that a clear and convincing evidence standard might be required for sentencing determinations in extraordinary circumstances.[3] Only the Third Circuit, however, has re-

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denied, 494 U.S. 1090 (1990); *United States* v. *Frierson*, 945 F.2d 650, 652 (3d Cir. 1991), cert. denied, 503 U.S. 952 (1992); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1238 (4th Cir.), cert. denied, 493 U.S. 943 (1989); *United States* v. *Casto*, 889 F.2d 562, 569-570 (5th Cir. 1989), cert. denied, 493 U.S. 1092 (1990); *United States* v. *Carroll*, 893 F.2d 1502, 1506 (6th Cir. 1990); *United States* v. *Masters*, 978 F.2d 281, 286-287 (7th Cir. 1992), cert. denied, 508 U.S. 906 (1993); *United States* v. *White*, 888 F.2d 490, 499 (7th Cir. 1989); *United States* v. *Payne*, 940 F.2d 286, 292 (8th Cir.), cert. denied, 502 U.S. 994 (1991); *United States* v. *Joetzki*, 952 F.2d 1090, 1096 (9th Cir. 1991); *United States* v. *Frederick*, 897 F.2d 490, 491-493 (10th Cir.), cert. denied, 498 U.S. 863 (1990); *United States* v. *Ignancio Munio*, 909 F.2d 436, 439 (11th Cir. 1990), cert. denied, 499 U.S. 938 (1991); *United States* v. *Alston*, 895 F.2d 1362, 1372-1373 (11th Cir. 1990).

[3] *United States* v. *Mergerson*, 4 F.3d 337, 343-344 (5th Cir. 1993), cert. denied, 510 U.S. 1198 (1994); *United States* v. *Concepcion*, 983 F.2d 369, 390 (2d Cir. 1992), cert. denied, 510 U.S. 856 (1993); *United States* v. *Masters*, 978 F.2d 281, 286-287 (7th Cir. 1992), cert. denied, 508 U.S. 906 (1993); *United States* v. *Lam Kwong-Wah*, 966 F.2d 682, 687-688 (D.C. Cir.), cert. denied, 506 U.S. 901 (1992); *United States* v. *Restrepo*, 946 F.2d 654, 661 n.12 (9th Cir. 1991) (en banc), cert. denied, 503 U.S. 961 (1992); *United States* v. *Townley*, 929 F.2d 365, 369-370 (8th Cir. 1991); *United States* v. *St. Julian*, 922 F.2d

quired a clear and convincing evidence standard to be applied to a Guidelines sentencing determination. See *United States* v. *Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990). And that case involved extraordinary circumstances not present here.

In *Kikumura*, the district court increased the defendant's sentence from approximately 30 months' imprisonment to 30 years' imprisonment, based on a finding that the defendant's offense of conviction was part of a larger, uncharged scheme to commit terrorist acts. The Third Circuit held that, in light of that 12-fold, 330-month departure (the equivalent of 22 levels), the facts underlying the departure had to be proved by clear and convincing evidence. 918 F.2d at 1100-1101. The court stressed that the heightened standard of proof was necessary because of the "extreme situation[]" in that case (*id.* at 1100), involving "the largest departure from an applicable guideline range * * * since the sentencing guidelines became effective" (*id.* at 1089). Since *Kikumura*, the Third Circuit has routinely applied the preponderance of the evidence standard to sentencing determinations that do not involve the kind of extreme circumstances at issue in that case. *United States* v. *Miele*, 989 F.2d 659, 663 n.3 (1993); *United States* v. *Badaracco*, 954 F.2d 928, 935 (1992); *United States* v. *Frierson*, 945 F.2d 650, 652 (1991), cert. denied, 503 U.S. 952 (1992); *United States* v. *Reyes*, 930 F.2d 310, 315 (1991).

This case does not involve the kind of extreme situation present in *Kikumura*. Petitioner contends

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563, 569 n.1 (10th Cir. 1990); see also *Kinder* v. *United States*, 504 U.S. 946, 948 (1992) (White, J., dissenting from denial of certiorari).

that, "at best", he should have been found responsible for 45 rather than 1,500 kilograms of cocaine. Pet. 12. The sole effect of the court's determination that petitioner was responsible for 1,500 rather than 45 kilograms, however, was to raise petitioner's offense level from 42 to 46 and his sentencing range from 30 years-life to a mandatory term of life imprisonment. Pet. 12. That four-level increase does not approach the kind of extraordinary circumstance at issue in *Kikumura*, particularly since petitioner would still have been eligible for a sentence of life imprisonment if he had been found responsible for 45 rather than 1,500 kilograms of cocaine.

In arguing that a preponderance of the evidence standard violates due process, petitioner also relies (Pet. 17-19) on *United States* v. *Lombard*, 72 F.3d 170 (1st Cir. 1995), but that case does not assist him. In *Lombard*, the defendant had been acquitted of state murder charges, but was subsequently convicted on federal firearms charges. *Id.* at 172. At sentencing, the district court found that the defendant had used a firearm to commit the very murders of which he had been acquitted in state court. The resulting Guidelines sentence was a mandatory term of life imprisonment instead of 262-327 months' imprisonment. *Id.* at 174-175 & n.6. On those facts, after characterizing the case as one in which "the tail has wagged the dog," *id.* at 177, the court of appeals held that the district court had authority to depart downward. *Id.* at 184. In reaching that conclusion, the *Lombard* court relied on the unique combination of factors involved in that case, including the state court acquittal, the magnitude of the enhancement, the seriousness of the enhancing conduct compared to the offense of conviction, and the mandatory life sentence. *Id.* at

180-186. The court emphasized that "this is an extreme case," and that "no comparable concerns would be raised by cases involving even sizable sentence increases based on * * * uncharged [conduct]." *Id.* at 186.

The present case is very different from *Lombard*. Petitioner was not tried and acquitted in state court; the difference between a sentencing range of 30 years to life and a mandatory life sentence does not approach the sentencing difference at issue in *Lombard*; and there is not the same disparity in seriousness between a conspiracy to distribute 45 kilograms and a conspiracy to distribute 1,500 kilograms of cocaine that there is between firearms possession and murder. In any event, *Lombard* addressed a court's authority to depart; it did not address the standard of proof issue raised by petitioner. Indeed, *Lombard* observed that a sentencing court finds facts under the preponderance of the evidence standard, and that a defendant has no due process right to sentencing under a higher standard of proof. 72 F.3d at 175-176. The First Circuit continues to adhere to the preponderance standard for sentencing determinations, and has cited *Lombard* as authority for that adherence. See *United States* v. *Clark*, 84 F.3d 506, 509 (1st Cir.), cert. denied, No. 96-5776 (Oct. 7, 1996); *United States* v. *Lindia*, 82 F.3d 1154, 1161 (1st Cir. 1996); *United States* v. *Black*, 78 F.3d 1, 5 (1st Cir.), cert. denied, No. 96-5500 (Oct. 7, 1996). Accordingly, *Lombard* is inapposite here.

2. Petitioner contends (Pet. 19-22) that the district court improperly enhanced his base offense level under Guidelines § 3A1.3, which permits a two-level upward adjustment "[i]f [the] victim was physically restrained in the course of the offense." That con-

tention is without merit. The evidence at trial showed that members of the drug trafficking conspiracies, including petitioner, were responsible for forcibly taking Adame and Olivares to Juarez where they were held and interrogated about the missing 100 kilos of cocaine. Petitioner tortured and beat Adame. Because the abductions of Adame and Olivares were committed in furtherance of the drug trafficking conspiracies, petitioner's sentence was correctly enhanced under Section 3A1.3.

Petitioner contends (Pet. 19-22) that imposition of the enhancement violated the grouping rule set forth in Section 3D1.2(c), Application note 5, which provides that "closely related" offenses should be grouped together "when conduct that represents a separate count * * * [is also an] adjustment to another count." According to petitioner (Pet. 20), that rule means that the sentence imposed on one count may not be enhanced by reference to another count unless they are both members of the same group. Because petitioner did not raise that contention in the court of appeals, Pet. C.A. Br. 35-37; Pet. C.A. Reply Br. 10, it is not properly presented here. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).

In any event, the grouping rule relied on by petitioner is only relevant in deciding whether the drug conspiracy counts and the kidnapping counts should have been grouped together, and petitioner concedes (Pet. 21) that those counts should not have been grouped together. The grouping rule has no bearing on the question whether an adjustment for restraint of a victim is appropriate when the restraint occurs in the course of a drug trafficking conspiracy and the defendant is also convicted of kidnapping. The issue is governed by the victim restraint guideline—Sec-

tion 3A1.3. As the court of appeals concluded (Pet. App. 26a-28a), Section 3A1.3 provides that the offense level of an offense should be adjusted when a victim is restrained in the course of the offense, unless that offense already takes victim restraint into account. Because the offense level for a drug trafficking conspiracy does not take victim restraint into account, petitioner's offense level for his drug trafficking conspiracies was correctly adjusted to reflect the fact that Adame and Olivares were restrained in the course of those conspiracies.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1996